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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 520

WABASH RAILROAD COMPANY, PETITIONER,

VS.

OCIE HAMPTON, ADMINISTRATRIX OF THE ESTATE OF JOHN LEO HAMPTON, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

JOSEPH A. McCLAIN, JR.,
JOSEPH H. MILLER,
JOHN S. MARLEY,
SAM B. SEBREE,
Counsel for Petitioner.

SEBREE, SHOOK, HARDY & HUNTER,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wabash Railroad Company, respectfully petitions for a writ of certiorari to review a final judgment and decision of the Supreme Court of Missouri, the highest court of that state, affirming a judgment for

$40,000 in favor of the above administratrix and against petitioner, entered in the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employers' Liability Act as amended August 11, 1939 (45 U. S. C. A., Sec. 51, *et seq.*), 53 Stat. 1404. The style of the case in the Supreme Court of Missouri is "Ocie Hampton, Administratrix of the Estate of John Leo Hampton, deceased, vs. Wabash Railroad Company," 204 S. W. 2d 708 (not yet officially reported). Said judgment and decision of the Supreme Court of Missouri became final October 13, 1947, and petitioner has exhausted its remedies in the courts of Missouri.

I.

Summary and Short Statement of Matters Involved.

John Leo Hampton, the deceased, section foreman of petitioner, and nine members of the crew under his supervision and control, were killed by a train of petitioner, while they were working on petitioner's track in a cut and on a curve, with a compressor and eight air hammers in noisy operation. Petitioner's track supervisor, who was deceased's superior, had made an inspection in this cut a day or two before. In view of the noise surrounding the operation of the compressor and air hammers, this supervisor, in order to protect deceased and his men, had given deceased a positive and specific order "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." There was no watchman on the bank, and the deceased was operating the compressor which motivated the air hammers, in violation of this order. Under the "primary duty rule" as announced by this Court, there can be no recovery under the Federal Employers' Liability Act for the death of an employee who violates a positive order given for his protec-

tion and which order, if obeyed, would have avoided the accident, even though others may have been negligent. There was no watchman on the bank. Therefore, under the order, the compressor should not have been in operation, the deceased could not have been working on the track using the air hammers, and the accident could not have happened.

This action is for the death of John Leo Hampton, which occurred August 4, 1942, shortly after 1:00 p. m., on petitioner's main-line track between Kansas City and St. Louis, about two and one-half miles west of Truesdale, Missouri, between Pendleton and Warrenton (Tr. 36, 3, 81). The deceased was the foreman of petitioner's section gang of seventeen men which was engaged in raising, ballasting, lining up and straightening said track (Tr. 3, 36, 37, 189, 195, 196). At the time of the accident and for some fifteen minutes prior thereto, the deceased and nine men in his gang were working on the track in a deep cut and on a curve (Tr. 17), with a compressor and eight air hammers in noisy operation. While so engaged, all ten who were working with the hammers were struck and killed by a daily, first-class, scheduled Wabash passenger train, running east under orders which permitted it to run at its usual running speed of 75 miles per hour (Tr. 25, 64, 65, 67, 195, 204).

The bank of the cut in which deceased was working was about twenty-five feet high (Tr. 143). The cut was 1,250 to 1,300 feet long (Tr. 17, 18). The curve began 300 feet west of the west end of the cut, and deceased and the other men at the hammers were working about 975 feet east of the west end of the cut. The compressor, the purpose of which was to furnish power through pipes to operate the air hammers, was in operation about 234 feet west of the hammers and on the north side of the track

(Tr. 18, 37). Approaching from the west, the curve was to the left, or north (Tr. 27).

A day or two before the accident, and while deceased and his section gang were working in the same cut, the deceased, under the undisputed evidence, received a positive and specific order from his superior, the track supervisor, "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles" (Tr. 196). The deceased violated this order, for the compressor was in operation, operating the hammers, at the time of the accident, and there was no watchman on the bank (Tr. 55, 67, 105).

Except for the few minutes during which time the accident occurred, deceased had always had a watchman on the bank while the men were working on the track in that cut (Tr. 54, 67). Deceased, who was in charge of the men and designated their work, without stopping the compressor had ordered the man who had been on the bank watching to do other work which required him to be down near the track for a short time (Tr. 23, 26, 45). At the time of the accident, this man was standing just west of the compressor, where he could not hear (Tr. 29, 38, 39, 48), and where he could see only about ten feet down the track (Tr. 39), and there was no watchman on the bank.

The deceased was twenty-nine years of age at the time of the accident (Tr. 8). He had been engaged in track work for about fifteen years (Tr. 88) and had been foreman of an extra gang during the season for three years or more (Tr. 57). He was the foreman in full charge of this crew (Tr. 56, 57, 159, 160, 188). It was his duty to obtain the lineup of trains for the day before he began work (Tr. 189, 190), and to have a copy of the current timetable with him while on duty (Tr. 202, 220). If a first-class train was late, it was his duty to learn when it would come along and only work his men during that interval at a place

where they were safe (Tr. 202, 203, 190, 191), and to keep the track in condition for that train (Tr. 204). It was his duty to instruct the watchman as to his duties (Tr. 192, 198), and to select the crew member to act as watchman and to see that the watchman was at his post (Tr. 54, 55, 204, 218, 107, 198). He knew that the passenger train involved here had not passed and was running late (Tr. 56, 59, 68, 107, 108, 218). He intended to move the compressor after this passenger train had passed, and to do so it was necessary to place it on the track and push it by hand to the new location (Tr. 46, 26), and to protect this movement he had sent a man in each direction to stop all trains after the train here involved had passed, until the compressor could be moved (Tr. 33, 37, 64, 66, 69, 208, 160, 166, 109). It was his duty to regulate the speed of trains through this cut (Tr. 197, 114, 115, 214, 215, 218), and on the morning of the day of the accident, he had caused a "slow" order to be issued which required all trains except first-class passenger trains to slow to twenty-five miles per hour approaching the place of the accident, and had put out a "slow" board a mile west of the point of the accident, on the engineer's side of the track, to slow down trains at this point to twenty-five miles per hour, except those trains that were excepted in the "slow" order (Tr. 130, 131). It was the undisputed evidence that the speed of the train involved was not restricted by the "slow" order or the "slow" board, and the deceased knew that the train could be expected to come through at its usual speed. It was also deceased's duty to have the track in condition for the train to come through at its usual speed, and protect himself and his men (Tr. 122, 123, 204, 140, 194, 195, 196, 118, 119, 120, 127, 130, 132, 136).

The train involved in the accident was a regular, scheduled, first-class, daily passenger train, traveling at a speed of seventy-five miles per hour (Tr. 31). It was

due at the point of the accident shortly before 1:00 o'clock p. m., and was a few minutes late. The train whistled approaching the curve east of Pendleton, about two miles from the place of the accident; it whistled again for a road crossing, about a mile and a quarter east of Pendleton, and then again approaching the curve where the accident occurred (Tr. 136). In each instance the regular road-crossing whistle was given. The road-crossing whistle consists of two blasts a second apart, a lapse of a second or two, then one short blast, then the lapse of a second, and then a long blast (Tr. 136). The final blast of the last whistle before the accident ended just as the train was going into the curve mentioned above (Tr. 136). These whistles were heard by all witnesses who were in a position to hear, but were not heard by the man at the compressor or the men at the hammers, or by the members of the gang working 200 feet east of the hammers, because of the noise of the hammers and the compressor (Tr. 66, 67).

There was no contention made by respondent that the whistles were not given as above set out. The case was submitted to the jury on evidence that the whistles were not sounded all the way around the curve in accordance with custom.

Under the above facts, the matters involved are: first, the application of the "primary duty rule" as announced by this Court; second, the negligence of the deceased as a matter of law; third, whether or not respondent's recovery is based on speculation and conjecture that deceased would have heard the train if it had whistled all the way around the curve; and fourth the conflict between instructions, which confused the contributory negligence of the deceased with his negligence as the sole cause of the accident, as will be more specifically pointed out in the brief.

II.

Statement As to Jurisdiction.

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stats. 937, U. S. C. A. Title 28, Secs. 344(a), 344(b) and 350, to review a judgment of the Supreme Court of Missouri rendered in the case of Ocie Hampton, administratrix of the estate of John Leo Hampton, deceased, respondent, vs. Wabash Railroad Company, appellant, No. 40021, 204 S. W. 2d 708 (not yet officially reported), affirming a judgment in favor of respondent and against petitioner in the sum of $40,000 rendered by the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employers' Liability Act as amended August 11, 1939, Title 45, U. S. C. A., Sec. 51, *et seq.*, 53 Stats. 1404.

The judgment of the Supreme Court of Missouri denies petitioner's rights which it claimed and to which it was entitled under the Federal Employers' Liability Act.

The Supreme Court of Missouri is the highest court of Missouri in which a decision could be had (Constitution of Missouri, 1945, Art. V, Sec. 2). "The Supreme Court shall be the highest court in the state." Art. V, Sec. 7 of said Constitution provides that the Supreme Court may sit *en banc* or in divisions.

On September 8, 1947, Division One of the Supreme Court of Missouri, to which the case had been previously assigned (Tr. 236), filed its opinion and affirmed the judgment of the Circuit Court of Jackson County, Missouri (Tr. 236).

On September 20, 1947, and within fifteen days after the affirmance of said judgment, petitioner (appellant), as provided by the rules of the Supreme Court of Missouri, filed in said Division One its motion for rehearing or to

transfer the cause to the Supreme Court of Missouri *en banc* (Tr. 246), which motion was overruled on October 13, 1947 (Tr. 252), on which date the judgment became final and petitioner had exhausted its remedies in that court.

The above motion was duly filed, pursuant to the Constitution of Missouri, Art. V, Sec. 9, which provides that a division may transfer a cause to the court *en banc*, and rules 1.19 and 2.02 of the Supreme Court of Missouri then in effect, which provide that motions for rehearing and to transfer to the court *en banc* must be filed within fifteen days after the opinion has been filed, and that the two motions may be joined and a rehearing or to transfer may be prayed in the alternative (Appendix to this petition, p. 13).

III.

Questions Presented.

Under the evidence and the decisions of this Court, did the Supreme Court of Missouri deny petitioner its rights under the Federal Employers' Liability Act:

1. In refusing to determine that petitioner was entitled to a directed verdict in its favor under the "primary duty rule," because deceased, an experienced foreman, working in a deep cut on a curve, operating eight air hammers and a compressor which interfered with his ability to hear trains, without the protection of a watchman on the bank, violated a positive and specific order from his superior "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles," which violation resulted in his death. If he had obeyed the order, the compressor and air hammers would not have been in operation and the accident would not have occurred.

Under the "primary duty rule" deceased's negligence was the sole cause of his death.

2. In refusing to determine that petitioner's instruction No. 7 (Tr. 226), which required the jury to find deceased negligent as a matter of law, should have been given.

3. In refusing to determine that petitioner was entitled to a directed verdict in its favor because the evidence left respondent's right to recover to speculation and conjecture.

4. In refusing to determine that respondent's instructions numbered 3 (Tr. 224) and 12 (Tr. 230) were in direct conflict with petitioner's instruction No. 9 (Tr. 228), and confuse contributory negligence and sole cause.

IV.

Reasons Relied On for the Issuance of the Writ.

1. The opinion of the Supreme Court of Missouri in the application of the "primary duty rule" is in conflict with the following decisions of this Court:

Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224.

Rocco v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743.

and with the following decisions of the United States Circuit Courts of Appeal:

Unadilla Valley Ry. Co. v. *Dibble*, 31 F. 2d 239, (Cert. den. 280 U. S. 565).

Willis v. *Penn. R. Co.*, 122 F. 2d 248 (Cert. den. 314 U. S. 684).

Southern Railway Co. v. *Hylton*, 37 F. 2d 843 (Cert. den. 281 U. S. 745).

Van Derveer v. *Delaware, L. & W. R. Co.*, 84 F. 2d 979 (Cert. den. 299 U. S. 595).

Chicago, St. Paul, M. & O. R. Co. v. *Arnold*, 160 F. 2d 1002 (8th Cir.).

2. The dictum of this Court in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, l. c. 63, 87 L. Ed. 610, l. c. 615, has caused confusion in the application of the "primary duty rule," where in discussing assumption of risk under the Federal Employers' Liability Act, the Court said:

> "* * * Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule,' in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley Ry. Co.* v. *Caldine*, 378 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22 * * *."

We submit that the "primary duty rule" involves neither contributory negligence nor assumption of risk. Under that rule, the negligence of the deceased or injured person is so complete in itself that it is deemed in law to be the sole cause of the accident.

3. Deceased was guilty of negligence (at least contributory, if not primary) as a matter of law, when under the undisputed evidence he violated a positive order which would have protected him; and the opinion of the Supreme Court of Missouri in upholding the action of the trial court in refusing petitioner's instruction No. 7 (Tr. 226, 227), which declared deceased guilty as a matter of law, denied petitioner's right to have the jury reduce the damages. (Respondent sued for $40,000, and the verdict was for $40,000.)

4. It is a matter of speculation and conjecture whether the deceased, working in a cut and on a curve with eight air hammers in operation, would have heard the train if the whistle had continued around the curve. He did not hear the whistles that were given, although all the wit-

nesses not in the vicinity of the compressor and air hammers, did hear them. The noise of the hammers and the compressor even prevented members of the gang working 200 feet east of the hammers from hearing the whistles that were given.

5. The court (Tr. 224) gave respondent's instruction No. 3, which permitted the jury to diminish the damages in the event they found that deceased was guilty of negligence which contributed to his death. Petitioner's Instruction No. 9 (Tr. 228), which told the jury that deceased could not recover if the jury believed his negligence was the sole cause of the accident, was given by the court. After Instruction No. 9 was given, respondent requested Instruction No. 12 (Tr. 230), which was given by the court. Instruction No. 12 referred to Instruction No. 9, and confused contributory negligence of deceased with his negligence as the sole cause of the accident.

PRAYER.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri, to the end that the judgment of that court in the cause above mentioned may be reviewed and that upon such review, the decision of that court be reversed, and for such further relief as to this Honorable Court may seem proper.

JOSEPH A. MCCLAIN, JR.,
JOSEPH H. MILLER,
JOHN S. MARLEY,
SAM B. SEBREE,
Counsel for Petitioner.

SEBREE, SHOOK, HARDY & HUNTER,
Of Counsel.

APPENDIX.

Rules of the Supreme Court of Missouri.

Rule 1.19—"Motions for Rehearing. Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

"The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere re-argument of issues determined by the opinion will be disregarded.

"If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time."

Rule 2.02—"Transfer to the Court en Banc. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court *en Banc* must be filed within fifteen days after the opinion of the court shall be delivered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court *en Banc* may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative."

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

WABASH RAILROAD COMPANY, PETITIONER,

VS.

OCIE HAMPTON, ADMINISTRATRIX OF THE ESTATE OF JOHN LEO HAMPTON, DECEASED.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri in Ocie Hampton, Administratrix of the estate of John Leo Hampton v. Wabash Railroad Company (Tr. 237), is reported in 204 S. W. 2d 708 (not yet officially reported).

II.

Statement of Jurisdiction.

The judgment of the Supreme Court of Missouri, the highest court of that state, determined rights claimed by petitioner under the Federal Employers' Liability Act as amended August 11, 1939 (45 U. S. C. A. 51; 53 Statutes 1404), adversely to petitioner. Jurisdiction of the court is urged under Section 237 of the Judicial Code, as amended by an Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 937; U. S. C. A., Title 28, Secs. 344(a), 344(b), and 350.

A more complete statement as to jurisdiction and the nature of the case is made under Point II of the Petition for Writ of Certiorari, and will not be repeated here.

III.

Statement of the Case.

The statement in Point I of the Petition for Writ of Certiorari is adopted here for the sake of brevity.

IV.

Specification of Errors.

The Supreme Court of Missouri erred in the following particulars:

1. In refusing to determine that petitioner was entitled to a directed verdict in its favor at the close of the evidence, where the evidence established that deceased, in operating the compressor without a watchman on the bank, violated a positive and specific order given to him by his superior "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." This order was given for de-

ceased's protection, and if obeyed the accident could not have happened.

2. In refusing to determine that petitioner's instruction No. 7 (Tr. 226, 227) which required the jury to find deceased negligent as a matter of law, should have been given by the trial court.

3. In refusing to determine that petitioner was entitled to a directed verdict in its favor because under the evidence the verdict against petitioner was necessarily based on speculation and conjecture.

4. In refusing to determine that instructions No. 3 (Tr. 224) and No. 12 (Tr. 230) requested by respondent and given by the trial court, were in direct conflict with instruction No. 9 (Tr. 228) requested by petitioner and given by the trial court, and confuse contributory negligence and sole cause.

Summary of the Argument.

I.

In operating the compressor without a watchman on the bank, deceased violated a positive order which, if obeyed, would have avoided the accident. Under the "primary duty rule" as announced by this court, the violation of the order became the sole cause of the accident, and this is true even though others may have been negligent.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224.

Unadilla Valley Ry. Co. v. *Dibble*, 31 F. 2d 239 (cert. den. 280 U. S. 565).

Frese v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212.

Rocco v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743.

Willis v. *Penn. R. Co.*, 122 F. 2d 248 (cert. den. 314 U. S. 684).

Southern Railway Co. v. *Hylton*, 37 F. 2d 843 (cert. den. 281 U. S. 745).

Van Derveer v. *Delaware, L. & W. R. Co.*, 84 F. 2d 979 (cert. den. 299 U. S. 595).

Chicago, St. Paul, M. & O. R. Co. v. *Arnold*, 160 F. 2d 1002, 1006.

II.

The dictum in *Tiller* v. *Atlantic Coast R. Co.*, 318 U. S. 54, 63, 87 L. Ed. 610, 615, to the effect that under the Federal Employers' Liability Act, contributory negligence through violation of a company rule, became assumption of risk, is misleading and confusing, is in conflict with the decisions under Point I above, and if taken literally destroys the "primary duty rule."

III.

Deceased was guilty of negligence which petitioner claims was the sole cause of the accident. Deceased was at least guilty of contributory negligence as a matter of law, and the court's failure to so instruct the jury deprived petitioner of its right to have the jury reduce the damages as provided by the Federal Employers' Liability Act.

(Authorities under Point I above.)

IV.

The verdict was based on speculation and conjecture. The negligence on which the case was submitted was failure to blow the whistle all the way around the curve (Tr. 222). Within two miles of the place of the accident

the crossing whistle (two long, a short and a long blast) was sounded three times. These whistles were heard by all of the witnesses in a position to hear, but because of the noise of the compressor and the air hammers were not heard by the man at the compressor, the ten men working with the air hammers or the men working two hundred feet from the hammers. Who can say without speculation that the whistle would have been heard in time if sounded around the curve?

V.

Instructions No. 3 (Tr. 224) and No. 12 (Tr. 230) requested by respondent are in conflict with instruction No. 9 (Tr. 228) requested by petitioner. Instruction No. 12 was given by the trial court, after petitioner's instruction No. 9 was given, and confuses sole cause with contributory negligence. Instruction No. 12, by referring to instruction No. 9 which submitted the negligence of deceased as the sole cause of his death, permitted the jury to find against petitioner even though deceased's negligence was the sole cause of his death.

ARGUMENT.

I.

The Supreme Court of Missouri in Failing to Apply the "Primary Duty Rule" Deprived Petitioner of Its Rights under the Federal Employers' Liability Act and under the Controlling Decisions of This Court.

At the time of the accident, John Hampton, the deceased, was the foreman in charge of a section gang that was working in a cut and on a curve on defendant's track, with a compressor and eight air hammers in noisy operation. He was working right at the hammers (Tr. 26, 64, 68). The evidence is clear and undisputed that the deceased had a specific, unqualified, and mandatory order from his superior, track supervisor McLaughlin, that he must not operate the compressor unless he had a watchman on the bank where he could see approximately two miles (Tr. 195, 196); that he violated this order is clear, as all the evidence shows that he was operating the compressor without a watchman on the bank (Tr. 55, 105).

He knew by his own order that the man who had been watching was working down in the cut (Tr. 23, 25, 26, 44), and knew that no one was on the bank to watch. The man who had been watching was at the time of the accident standing west of the compressor where he could not hear and where he could see only ten feet (Tr. 39, 58), at the time fast eastbound train No. 2 suddenly appeared a short distance away. Deceased knew No. 2 was a scheduled train (Tr. 202, 220), and that it had not passed, and that it was late and could be expected at any moment. He knew that it would come through at its usual speed because he had given the slow order which had excepted No.

2 (Tr. 196, 197, 115), and had sent a man west to flag all trains after No. 2 (Tr. 160). There was nothing to extenuate his conduct or confuse his judgment, and his duty was as clear as its performance was easy. He knew the danger and was in entire control of the means to prevent it.

Under the law, a violation of a positive duty or instruction by an employee, without which violation he would not have been killed, bars recovery for his death, even though other employees may have been negligent. The instruction of McLaughlin was positive; that it was given is undisputed, as is also the fact that it was violated, and if it had not been violated, the compressor would not have been operating without a watchman on the bank, deceased and his men could not have been working with the air hammers, and the accident would not have occurred.

In a well established line of decisions, this Court, in construing the Federal Employers' Liability Act, has consistently held that where an employee violates a positive order issued to him for his own safety, and is injured as a result thereof, his negligence is so directly responsible for his injury that it is deemed in law to constitute the sole cause of his injury, even though other employees may have been negligent. In other words, that his violation is so sufficient in itself that he cannot escape the responsibility for the consequences of his own wrong by showing that some other employee could have done more.

To bring this rule of law sharply to the court's attention, we first refer to *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224, and *Unadilla Valley Ry. Co.* v. *Dibble*, 31 F. 2d 239, (cert. den.) 280 U. S. 565, 74 L. Ed. 618. Caldine and Dibble were respectively the conductor and engineer or motorman on a suburban passenger car. They were the only members of the crew. They each had a copy of a train order which provided that they should wait at

a certain station until another train had passed. They both violated the order and proceeded past the station. In the ensuing collision, the conductor, Caldine, was killed, and the engineer, Dibble, was injured. Suit was brought for Caldine's death based on Dibble's negligence, and Dibble brought suit for his injury based on Caldine's negligence. Recovery was denied in the Caldine Case, even though the engineer, Dibble, was negligent, and in the Dibble Case, even though the conductor, Caldine, was negligent. The holding in each case was that the violation of the positive order barred recovery and that neither could recover on the negligence of the other.

In *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131, plaintiff's intestate, a locomotive engineer, was killed when he proceeded across a railroad crossing without positively ascertaining, by sending another member of the crew to look, that the way was clear. Such a duty was imposed on the engineer by state law. In the ensuing collision, the engineer was killed. Plaintiff offered evidence to the effect that the fireman could have looked and warned the deceased engineer of the approaching train, and contended that the deceased engineer's negligence was merely contributory and would not bar a recovery. In refuting this theory and holding the deceased engineer's negligence to be the sole cause of the accident, this Court said, at page 3 (L. Ed., p. 132) of its opinion:

> "* * * Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act (April 22, 1908, Chap. 149, Sec. 3, 35 Stat. at L. 65, 66, Comp. Stat., Sec. 8659, 8 Fed. Stat. Ann. (2d Ed.), p. 1339) to hold that he could recover for an injury primarily due to his failure to act as required,

on the ground that possibly the injury might have been prevented if his subordinate had done more. See *Great Northern R. Co.* v. *Wiles*, 240 U. S. 444, 448, 60 L. Ed. 732, 36 Sup. Ct. Rep. 406. * * *"

In *Davis* v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212, plaintiff's intestate, an engineer of a passenger train, had an order not to pass a certain station unless he or some member of the crew knew that a train from the opposite direction had passed. The train was crowded and the deceased engineer proceeded past the station without ascertaining the location of the oncoming train. A collision occurred and the plaintiff's intestate was killed. The Supreme Court of Tennessee affirmed a judgment of the trial court allowing recovery, on the theory that the other members of the crew were also negligent. This court reversed the judgment, and at page 148 (L. Ed., p. 216) of its opinion, said:

"The trial was in a court of the State of Tennessee, and the plaintiff got a judgment, which was sustained by the supreme court of the state on the ground that the other members of the crew, as well as the engineer, were bound to look out for the approaching train, and that their negligence contributed as a proximate cause to the engineer's death. We are of opinion that this was error. It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary, as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more. *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 3, 68 L. Ed. 131, 132, 44 Sup. Ct. Rep. 1."

In *Willis* v. *Penn. R. Co.*, 122 F. 2d 248 (cert. den. 314 U. S. 684), three yard employees were ordered to repair

a switch in a gravity classification yard. The custom was for one of the crew to watch for trains while the other two repaired the switch. On the day in question, plaintiff's intestate had the duty to act as lookout and see that the other two men were protected as they bent over and worked on the rails with a hammer and chisel. While the two men were working on the rails, a switching crew kicked a freight car into the switch. Plaintiff's intestate not only failed to warn the two men working, but failed to see the car coming into the switch and was, himself, killed. The actionable negligence claimed by plaintiff was the practice of kicking cars pursuant to the custom that some member of the repair gang should stand watch.

In holding that the negligence of the deceased was the sole cause of his death, the United States Circuit Court of Appeals, at page 249 of its opinion, said:

> "If the testimony of Donofrio and Myers is believed, Willis' neglect of his personal duty to act as watchman was the sole cause of his own death. In such circumstances, his executrix can have no recovery under the Act. *Great Northern Ry.* v. *Wiles,* 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732; *Davis* v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; *Unadilla Ry. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; *Blunt* v. *Pennsylvania R. Co.,* 6 Cir., 9 F. 2d 395; *Unadilla Valley Ry. Co.* v. *Dibble,* 2 Cir., 31 F. 2d 239. The recent amendment, 45 U. S. C. A., Sec. 54, excluding as a defense assumption of risk, has no bearing on the rule that an employee cannot recover for injuries resulting solely from his own fault."

In *Southern Ry. Co.* v. *Hylton,* 37 F. 2d 843 (6th Cir.) (Cert. den. 281 U. S. 745), Hylton, an engineer had received a warning order to look out for a steel gang, which under the uncontradicted testimony meant to keep his

train under control so that he could stop it in half the distance he was able to see ahead. Hylton violated the order, which violation resulted in a derailment in which he was killed. In holding such negligence the sole cause of his death the court in its opinion said:

> "At Clinton, a few miles west, Hylton had stopped for orders. 'Train Order 19' seems to be the general term for special warnings and cautions to trainmen. At Clinton, written upon the blank for order 19, Hylton received a copy of the train dispatcher's order, dated at Knoxville on that day, and reading: 'To all trains at Clinton. Look out for steel gang laying rails today between 14 and 15 C mile posts, from 7 A. M. until 4 P. M.' The uncontradicted testimony from witnesses on both sides is that this order made it Hylton's imperative duty to hold his train during this mile under such control that he could at any time stop within half the distance of his clear vision ahead. * * *
>
> "* * * He not only did not keep his train under control, within the distance directed, but, after once coming to a dead stop, and after again having maintained for a period perfect control, he deliberately released it. If he had obeyed the 19 order, there would have been no derailment.
>
> * * * * * * *
>
> "In this situation we think it clear that Hylton's general disobedience of the 19 order and his specific and voluntary release of control because he had misjudged the distance of the danger constituted the sole efficient cause of the disaster, and the absence of any further second flag cannot be treated as a substantially contributing cause. The recent decisions of the Supreme Court require this conclusion.
>
> * * * * * * *
>
> "In *Frese* v. *Chicago, etc., R. Co.*, 263 U. S. 1, 44 S. Ct. 1, 2, 68 L. Ed. 131, there was a collision at a grade crossing of two railroads. One of the engi-

neers was killed, and this action against his employer resulted. His contributory negligence was not involved. It was his duty under the rules (and it was no different duty because it was also required by statute) to bring his train to a full stop and ascertain that the way was clear before proceeding. He brought his train to a stop, and proceeded, and was in collision. The other train was approaching from the fireman's side, and it was plainly the fireman's duty to keep watch for such approach and give notice to the engineer. The fireman had neglected this duty. Without the neglect, the collision would not have occurred. The court denied any recovery on behalf of the engineer, and said: 'Moreover the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice he could not escape this duty, and it would be a perversion of the Employers' Liability Act (45 U. S. C. A., Sec. 53) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more.' The only suggested distinctions between that case and this are as between a statute and a train dispatcher's express order, and as between a subordinate and an employee in another department. We see no substance in these distinctions."

The conclusion from these cases is that where an employee fails to perform a positive duty and is injured, even though another may have been negligent, he cannot recover, and it is immaterial whether that duty is imposed by rule, order, instructions, state law or custom. The negligence of one does not contribute to the negligence of the other, because of the positive duty of the person injured.

In the case at bar deceased was guilty of wanton and gross negligence; he ordered the man who had been on

the bank watching to do other work which kept him off the bank, and knowing that there was no watchman on the bank and that No. 2 might come through any minute, operated the compressor in violation of the positive order not to do so, without a watchman on the bank.

Deceased's negligence in violating the order was the proximate cause of his own death and the death of nine of his crew. His negligence was so direct and so complete that under the foregoing decisions, the Missouri Court should have held it was the sole cause of his death, as a matter of law.

The Supreme Court of Missouri in its opinion refers to the case of *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 77 L. Ed. 743, as being an authority against petitioner's contention. The Missouri Court misconstrues the Rocco case. In that case there was a general rule of the railroad which forbade track walkers to occupy the main line track without first ascertaining from the operator the whereabouts of approaching trains. Rocco, a track walker, went on the main line on a track inspection tricycle without getting the line-up of trains and was killed in a collision with a passenger train. The negligence charged was that the train was operated at excessive speed and failed to give warning of its approach, also that Rocco was not furnished a safe place to work. The contention of the railroad was that Rocco's violation of the rule was the primary cause of the accident, relying on the Unadilla Valley and other cases cited in this brief. This Court recognized the "primary duty rule" laid down in those cases, but held that the Rocco Case didn't come within that rule because the rule did not forbid him going on the track after he found out about the location of the trains. In so holding the Court said on page 279 (p. 746, L. Ed.):

> "These decisions are not controlling in the present case. There is no suggestion that the rule upon which the respondent relies forbade Rocco to start on his inspection trip if he ascertained that the approaching train was within seven or eight miles of Ithaca. It was his duty to make his afternoon trip. The rule required no more than that before leaving he should acquaint himself with the whereabouts of trains on the branch and guide himself accordingly. If he had made inquiry, whether he should await the arrival of the train, or attempt to meet it at some point a short distance from that city, was a matter for his decision. If the rule had *forbidden* him to leave under circumstances such as inquiry by him would have disclosed, this case would be parallel with those cited."

If Rocco had been forbidden to go on the track under circumstances which inquiry would have disclosed, the rule would have been like the order in the case at bar, where deceased, with no evidence for need for haste, was forbidden to operate the compressor unless he had a watchman on the bank and the accident could not have happened.

The Supreme Court of Missouri in its opinion correctly quotes from the opinion of this Court in regard to the duty resting on the deceased in *Frese* v. *Chicago, B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131, and then infers that the case goes off on the ground that there was no other negligence than that of the deceased, Frese. This Court does say that the other negligence claimed was too speculative, but the decision in the case was based on the failure of Frese to perform the positive duty imposed upon him by statute, regardless of whether or not there was a practice for the fireman to look, and regardless of what the fireman could have done if he had looked. While the opinion of this Court does not set out what practice was referred to, by turning to the *Frese Case* in the Missouri reports, 290 Mo. 501, 235 S. W. 97, it will be seen that the practice referred

to was the practice of the fireman to look out for engines on his side of the train when crossing another track, so the decision of this Court is that the engineer's violation of the statute bars recovery for his death, regardless of whether or not the fireman was negligent.

We have the utmost respect for the Supreme Court of Missouri, but it entirely missed this point in the case. In its opinion it quotes the order correctly: "* * * not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." The Court then turns the order around and speculates that the accident might have happened even if there had been a watchman on the bank. *That is not the point.* The evidence is undisputed that there was no watchman on the bank and that deceased *was* operating the compressor. It was the operation of the compressor without a watchman on the bank that violated the order, and not the failure to have a watchman on the bank. So, why speculate as to what might have happened if there had been a watchman on the bank? It can only be conjectured that the accident might or might not have occurred. But it is certain that if deceased had not operated the compressor, which he was forbidden to do without a man on the bank, the compressor and hammers would have been silent, the deceased and his men would not have been on the track, and the accident could not have happened. That is the test laid down in the Unadilla, Frese, and other cases cited by us, namely, would compliance with the order have avoided the accident, regardless of what anyone else did.

In the Supreme Court of Missouri respondent took the position that the order which deceased violated was established only by the parol testimony of McLaughlin (Tr. 196) and Lee (Tr. 210, 211) and, therefore, the jury had the right to disregard it. The Missouri court did

not decide the case on that point. This Court, however, has expressly passed on that question. In *Chesapeake & O. R. Co.* v. *Martin*, 283 U. S. 209, 75 L. Ed. 983, l. c. 987:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from *no reasonable point of view is it open to doubt.* The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, *there was no cross-examination.* Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only *possible* ground for submitting the question to the jury as one of fact was that the *witness was an employee of the petitioner.* In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held" (Italics ours). Citing and quoting *Hauss* v. *Lake Erie & W. R. Co.*, 105 Fed. 733, and *M. H. Thomas & Co.* v. *Hawthorne*, 245 S. W. 972 (Tex.).

And the United States Circuit Court of Appeals, in the recent case of *Willis* v. *Pennsylvania R. Co.*, 122 F. 2d 248 (Cert. Den. 314 U. S. 684), at page 250 of its opinion, said:

> "* * * The appellant urges that the jury was free to discredit the testimony that Willis was to act as watchman for the repair gang and that its verdict shows that such testimony was disbelieved. The testimony is analyzed in detail in Judge Byers' opinion, reported in 35 F. Supp. 941. We agree with his con-

> clusion that it was trustworthy. The jury could draw no inferences from the demeanor of the witnesses since their testimony was given by deposition, and we can see nothing in it which would justify the jury in finding that Willis was not to act as lookout for approaching cars. A verdict based on such a finding should not be permitted to stand. *Chesapeake & O. Ry. Co.* v. *Martin,* 283 U. S. 209, 216, 51 S. Ct. 453, 75 L. Ed. 983; Wigmore, Evidence, 3d Ed., Sec. 2495; *Pennsylvania Ry. Co.* v. *Chamberlain,* 288 U. S. 333, 340, 53 S. Ct. 391, 77 L. Ed. 819."

See also *Pennsylvania Ry. Co.* v. *Chamberlain,* 288 U. S. 333, 77 L. Ed. 819.

It is clear from these controlling authorities that, a jury will not be permitted to disbelieve or ignore uncontradicted testimony under the guise of passing on its credibility, unless there exists some reasonable and substantial *basis* for doubt.

The depositions of McLaughlin and Lee which were introduced in evidence and in which the order to have a watchman on the bank appeared, were taken by respondent on October 27, 1944 (Tr. 176, 204). The trial began March 18, 1946 (Tr. 7). In the sixteen months which elapsed between the taking of the depositions and the trial no attempt was made by respondent to contradict that evidence. In fact, the evidence of respondent's witness George Hampton corroborates McLaughlin and Lee that the order was given. George Hampton testified that deceased had always had a watchman on the bank in that cut when the hammers were running (Tr. 54, 67). While it is difficult to recognize the George Hampton who gave the second deposition (Tr. 15) as the same man who gave the first deposition (Tr. 35), there was nothing in the second deposition which contradicted his testimony that deceased had always had a watchman on the bank when the hammers were running.

The opinion of the Missouri Court in failing to apply the "primary duty rule" has failed to follow the decision of this Court and has deprived petitioner of its rights under the Federal Employers' Liability Act.

II.

The Dictum of This Court in Tiller v. Atlantic Coast Line, 318 U. S. 54, 63, 87 L. Ed. 610, in a Case Not Involving the "Primary Duty Rule," to the Effect That under the Federal Employers' Liability Act, Contributory Negligence Through Violation of a Company Rule Became Assumption of Risk, Is Misleading and Confusing and If Taken Literally, Destroys the "Primary Duty Rule."

The following statement of this Court in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54, at page 63, 87 L. Ed. 610, at page 615, has caused confusion in the application of the "primary duty rule" when, in discussing assumption of risk under the Federal Employers' Liability Act:

> "* * * Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. *Unadilla Valley R. Co.* v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; *Davis* v. *Kennedy,* 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22. * * *"

The very foundation of the "primary duty rule" is that it does not involve contributory negligence or assumption of risk. The rule is that, where an employee has a positive duty to perform and fails to perform it, resulting in his injury, he cannot recover, even though other employees may have had the same duty, which they failed to perform. It is his negligence which bars his recovery. The negligence of others has nothing to do with the matter.

Their negligence is not contributory, nor is there any question of assumption of risk. His negligence is the "sole cause" of his injury.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224.

Unadilla Valley Ry. Co. v. *Dibble*, 31 F. 2d 239 (cert. den. 280 U. S. 565).

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212.

Frese v. *C., B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Van Derveer v. *Delaware, L. & W. R. Co.*, 84 F. 2d 979, 981 (cert. den. 299 U. S. 595).

Willis v. *Penn. R. Co.*, 122 F. 2d 248, 249 (cert. den. 314 U. S. 684).

The above dictum in the Tiller Case is confusing to the public, the bench, and the bar, and is not supported by the decisions of this Court given as authority for the statement.

We submit that the Court should take this case, clarify the Court's statement in the Tiller Case, and settle the conflict which exists in the decisions of the courts in the application of the "primary duty rule."

III.

Deceased Was Guilty of Negligence As a Matter of Law, and the Opinion of the Supreme Court of Missouri in Refusing to Hold That Petitioner's Instruction No. 7 Should Have Been Given Deprived Petitioner of Its Rights under the Federal Employers' Liability Act.

Petitioner's printed rules (2005, 2006) placed on the foreman the responsibility for personal injury to himself and his men (Tr. 122). These rules applied to extra and floating gang foremen such as John Hampton (Rules 1097, 1098, 1099) (Tr. 123).

Rule 1097 provided: "Extra and Floating Gang Foremen, in charge of trackmen, report to and receive instructions from the Track Supervisor" (Tr. 123).

John Hampton received from his track supervisor, Ray McLaughlin, an order, "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles" (Tr. 195, 196).

At the time this accident occurred the compressor was in operation and there was no watchman on the bank. The man who had been watching on the bank had been ordered by deceased to other work down in the cut. This man was standing just west of the compressor, where he could not hear (Tr. 37, 38, 39) and where he could see only about ten feet down the track (Tr. 39).

In the light of this evidence showing a clear violation of the order under which John Hampton was required to carry on his work, defendant requested instruction No. 7 (Tr. 226), which would have advised the jury that the violation of this rule constituted negligence as a matter of law. The ruling refusing this instruction forced petitioner to assume the burden (Defendant's Inst. No. 9, Tr. 228) of convincing the jury that the non-observance of this order constituted negligence, when petitioner was entitled to an instruction that the failure of deceased to obey the order constittued negligence as a matter of law. This ruling refusing requested instruction No. 7 placed an unnecessary and illegal burden on petitioner and was prejudicial to its rights under the Federal Employers' Liability Act. If the instruction had been given the jury would at least have been required to reduce its verdict.

IV.

The Evidence Left It to Conjecture and Speculation As to Whether Sounding the Whistle Around the Curve Would Have Prevented the Accident.

Petitioner contends there was no substantial evidence in this case that the sounding of a whistle around this curve would have prevented this accident.

Eight of the men in this crew were on the track, bent over operating eight air hammers (Tr. 52). These men were working in a group very close together so that the combined noise and din of the eight air hammers practically, if not completely, eliminated any possibility of any of these eight hearing a whistle far enough away to enable them to get to a place of safety (Tr. 67, 111, 215, 216). Certainly it would be the purest speculation on this evidence to conclude that one of these eight men operating these chattering air hammers might have heard a whistle had it been sounded around the curve, in time to have enabled deceased to get to a place of safety.

The compressor was also going at the time (Tr. 33, 37, 38). It made so much noise that a train whistle could not be heard by one near it (Tr. 37, 38). As George Hampton deceased's uncle was admitteedly standing just west of the compressor at the time, having previously approached the compressor and adjusted the valve, it is obvious that for a period of time he could not have heard a train whistle around the curve had it been sounded (Tr. 37, 38). He was in no position to watch out for anyone except himself (Tr. 58).

Aside from George Hampton, the only other witness for respondent who was at the scene of the accident at the time it occurred was Harold Richardson, whose deposition was taken and read by respondent. This witness was engaged in doing some shoveling about 200 feet east of the place where the hammers were working (Tr. 62, 66).

He had just been up in the bushes in a ditch south of the track answering a call of nature (Tr. 63). He testified that he heard no whistle; but he did not testify that he was giving any attention to listening for a train at the time. While he was off the track on the south bank, he was in no danger and while in the ditch and shrubbery was in a poor position to hear anything. He had the right to assume, and undoubtedly did assume, that the men 200 feet west in earlier danger from that direction were maintaining a lookout in that direction. Furthermore at the place he was there was considerable noise from the hammers and compressor (Tr. 66, 67).

Ollie Wright, another member of this extra gang and a witness for petitioner, was working with respondent's witness, Harold Richardson, at the same place about 200 feet east of the hammers (Tr. 109, 110). He testified that at that point he could hear the noises of both the hammers and the compressor (Tr. 110, 111). He testified that he heard no whistle but said he "just couldn't hear because of that air pressure making so much noise" (Tr. 111). He testified he "couldn't hear the train at all" at that point (Tr. 112). This same interference necessarily affected the ability of Richardson to hear a train whistle.

Andrew Morton, another member of this crew, who was working about 200 feet east of the hammers, testified as a witness for petitioner that when the hammers were running, they made so much noise he could not even hear the compressor (Tr. 103). When the hammers were running he could hardly ever hear a train whistle (Tr. 106).

Comer Sheely testified that at the direction of the deceased, he went west to flag the trains after No. 2 went by (Tr. 160, 166). He had gone a quarter to a half mile west of the hammers when the train passed him (Tr. 160). He testified that when the hammers were

going, a train whistle could be heard only part of the time (Tr. 162). He did not say how close the train had to be for the whistle to be heard.

C. V. Lee testified that with the hammers running, the operators of the hammers could not hear the train whistle even at a distance of two or three hundred feet (Tr. 215, 216).

Track supervisor, McLaughlin, said in his experience, the men operating the hammers could "usually" hear a train whistle as much as a quarter of a mile away (Tr. 200). His statement was in general terms. He expressed no opinion as to the men's ability to hear in this deep curving cut with brush and shrubbery on the banks.

Deceased's father, Leo Hampton, an old experienced foreman, testified for the plaintiff on direct examination as follows (Tr. 80):

> "Q. While the men were working on the track using their hammers and the foreman with them tell us whether or not the noise of the whistle, the warning whistle, can or cannot be heard by the foreman or the men when the hammers are running?
>
> A. They can be heard.
>
> Q. Have you had that experience over many years?
>
> A. Yes, sir."

This witness did not attempt to say how near the train had to be for the whistle to be heard under such circumstances, nor did he attempt to say a whistle could be heard by the men while working in a deep cut in a curve with the banks covered with bushes and shrubbery. We submit his testimony amounts to no more than that sometimes, when the train is close enough and conditions are right, it is possible to hear the train whistle over the noise of the hammers.

We have discussed the strongest evidence in this record from respondent's viewpoint, and submit it is not

substantial but leaves the matter to speculation and conjecture as to whether under conditions there existing a train whistling all the way around the curve would have been heard in time to enable deceased to get off the track to a place of safety before this fast train reached that point.

Mr. Lee testified that he had been sent east to flag by deceased (Tr. 208). That he had reached a point about three-fourths mile east of the point where the accident occurred at the time of the accident (Tr. 206). He heard the train whistle (Tr. 211). Comer Sheely heard the train whistle after it passed him and when it was about half way between the crossing and the cut (Tr. 162). The engineer, Boque, testified that he started blowing the last crossing whistle approximately a quarter of a mile west of the west end of this curve and continued blowing it for nine seconds or for a distance of 972 feet (Tr. 136). The fireman, Lewis, testified that the engineer whistled until he reached the corner of the curve (Tr. 170). Thus every witness who was not in close proximity to the hammers and the compressor heard the whistle.

We submit the evidence in this case is insufficient to make a case for the jury as to the ability of the men at the hammers and compressor to have heard a whistle in time to have prevented the accident.

V.

Respondent's Given Instructions No. 3 (Tr. 224) **and No. 12** (Tr. 230) **Are in Direct Conflict with Petitioner's Given Instruction No. 9** (Tr. 228), **and Confuse Contributory Negligence and Sole Negligence.**

Respondent's instruction No. 3 deals with the issue of contributory negligence. Petitioner's instruction No. 9 deals with sole negligence of deceased. Respondent's in-

struction No. 12 (Tr. 230) given after petitioner's instruction No. 9, begins:

> "Instruction No. 9 submits to you the issue of sole cause. Now as to such issue of sole cause and such instruction, you are instructed that if you find from the evidence that John Hampton was negligent * * *."

Very clearly the negligence of John Hampton referred to is sole negligence as submitted under defendant's instruction No. 9. We do not believe it is possible that the jury could have understood instruction No. 3 to mean otherwise.

Such instruction No. 9 continues (Tr. 228):

> "and find from the evidence that the railroad was negligent as submitted to you in instruction No. 1, and find from the evidence that such negligence of the railroad, if so, and such negligence of John Hampton, directly concurred and combined in causing the death of John Hampton, then you will find the issue of sole cause in favor of the plaintiff."

"Such negligence of John Hampton," as used in the part of this instruction last quoted, also clearly refers to sole negligence. Obviously sole negligence cannot at the same time be concurring negligence. This instruction confuses sole negligence and concurring negligence. It tells the jury that if the sole negligence of John Hampton concurs with the negligence of petitioner as submitted in instruction No. 1, "then you will find the issue of sole cause in favor of the plaintiff." Sole cause and concurring negligence are utterly inconsistent and contradictory concepts. By this instruction petitioner is robbed of its sole cause submission which is not a defense at all. Petitioner's defense of sole cause was completely undermined and sabotaged by this instruction No. 12.

CONCLUSION.

We urge the Court to grant this writ for the reasons above set out and because of the confusion of the courts and the bar in respect to the "primary duty rule" and its application. Witness the opinion of the Missouri Court in this case, the dictum of this Court in the Tiller case, the dissenting opinion in *Chicago, St. Paul, M. & O. Co.* v. *Arnold,* 160 F. 2d 1002, and the opinion in *Van Derveer* v. *Delaware, L. & W. R. Co.,* 84 F. 2d 979 (Cert. denied 299 U. S. 595).

The Missouri Court by its judgment has deprived the petitioner of its rights under the Federal Employers' Liability Act.

Respectfully submitted,

JOSEPH A. MCCLAIN, JR.,
JOSEPH H. MILLER,
JOHN S. MARLEY,
SAM B. SEBREE,
Counsel for Petitioner.

SEBREE, SHOOK, HARDY & HUNTER,
Of Counsel.